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April 28, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: BellSouth Request for Declaratory Ruling that State Commissions May not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Service, CC Docket No. 03-251.

Dear Secretary Dortch:

I write on behalf of AT&T Corp. to address several issues raised in BellSouth's *ex parte* filing of March 1, 2004 ("BellSouth Ex Parte") and in BellSouth's Reply Comments in this docket, filed February 20, 2004 ("BellSouth Reply Comments"). The grounds for denying BellSouth's Petition in this docket are straightforward: (i) several state commissions have found after lengthy proceedings that BellSouth's policy of discontinuing service to its own DSL customers who switch voice service to a competitive carrier serves to maintain BellSouth's local service monopoly and otherwise impedes local voice service competition; (ii) those states have crafted carefully limited policies designed to end BellSouth's restrictive lock-in practice; (iii) the state remedies are grounded in their undoubted powers over intrastate telephone service, as well as their power over intrastate communications effected by the retail DSL services at issue; and (iv) those state decisions are fully consistent with the Commission's own policies designed to enhance local telephone service competition and in no way interfere with the Commission's broadband (or other) policies.

The central flaw underlying BellSouth's claims that the Commission can and should preempt each of these state decisions is a failure to identify any conflict between federal and state requirements that could conceivably meet the established test for preemption of state regulation of jurisdictionally mixed services: whether a state determination so conflicts with a federal rule that it "negates the exercise by the FCC" of its own powers. *See NARUC v. FCC*, 880 F.2d 422, 428-29 (D.C. Cir. 1989); *see also, e.g., Louisiana PSC v. FCC*, 476 U.S. 355, 360

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(1986); *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994); *California v. FCC*, 905 F.2d 1217, 1241-43 (9th Cir. 1990); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977). In the absence of that showing – and no such showing is possible here – no preemption order could be sustained. The state regulatory decisions at issue do no more than forbid BellSouth from punishing customers that seek to take advantage of local telephone competition by refusing to provide DSL service to those customers *at any price*. As detailed below, BellSouth's claims that these pro-competitive state requirements so offend federal requirements that the Commission must take the extraordinary step of preempting them rest on unsupported and plainly false claims regarding broadband incentives and compliance costs, and on the construction of BellSouth's wholesale DSL tariffs and their effect on the states' ability to ensure that BellSouth does not engage in *retail* practices that maintain its local retail telephone service monopolies.

BellSouth is attempting to fool the Commission into thinking that this is a narrow proceeding merely to resolve direct conflicts between federal and state unbundling determinations. The reality is different in every respect. For example, although BellSouth's UNE-P focused preemption advocacy is itself riddled with errors – there are no conflicts between the states' local competition-protecting regulatory decisions and the Commission's line sharing policies – BellSouth pointedly ignores the startling VoIP implications of its petition. If the Commission were to preempt the state orders at issue here, nothing would prevent BellSouth from disconnecting DSL service when a customer discontinues its BellSouth voice service in favor of a VoIP offering *to be provided over that DSL line*. Granting the petition plainly would impede nascent VoIP competition. Because BellSouth asserts a federally tariffed right to sell DSL service *only* to customers that purchase BellSouth voice service, BellSouth could, under its erroneous construction of its tariff, immediately disconnect the DSL service of a customer that decides to purchase VoIP service from a competitive carrier – *leaving the customer without voice or broadband service*. It is difficult to imagine a more potent barrier to VoIP entry or a more obvious violation of the Commission's stated objective of encouraging VoIP deployment and competition. Of course, these VoIP concerns are just one of many reasons why granting BellSouth's "emergency" petition would paint the Commission in a very bad light. The courts have for more than 50 years recognized that where "a monopolist refuses to deal with customers who deal with its rivals," such "behavior is inherently anticompetitive [and] . . . is illegal." *Byars v. Bluff City News Co.*, 609 F.2d 843, 858 (6th Cir.1979); *see also Lorain Journal Co. v. United States*, 342 U.S. 143, 147-49 (1951).

1. The Triennial Review Order Does Not Preempt the State Decisions. BellSouth's filings in this docket continue to distort the substance and effect of the Commission's *Triennial Review Order* ("TRO"). BellSouth claims that "[t]hese state decisions violate this Commission's rules and orders" because "the Commission held in the TRO that incumbents are not required to provide broadband services over the same UNE loops that CLECs use to provide voice services." BellSouth Ex Parte, at 2. BellSouth's Reply Comments rest upon the claim (at 9) that "[t]he *Triennial Review Order* resolved the same issue presented here." Not only are BellSouth's

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characterizations of the TRO incorrect. But even if they were true they would not yield the conclusion that the state orders are preempted.

The legal issue resolved in the *Triennial Review Order* paragraph BellSouth relies upon was whether the Commission should, under federal law, require “separate unbundl[ing of] the low frequency portion of the loop,” and the Commission simply “conclude[d] that unbundling the low frequency portion of the loop is not necessary to address the impairment faced by requesting carriers.” TRO ¶ 270. As the Act makes clear, *see* 47 U.S.C. § 252(d)(2); *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), and as the Commission expressly determined, *see* TRO ¶¶ 109-110, the impairment decision before the Commission in the *Triennial Review* proceeding is far different from an exhaustive consideration of what measures might best advance the Act’s goals, enhance competition, or address policies underlying the antitrust laws. The Commission could not and did not, in the course of an impairment determination, purport to shield BellSouth from any obligation – arising from any source – to continue to provide DSL service to its customers who switch their local service from BellSouth.¹ Indeed, the Commission did not even address the lock-in effects that gave rise to the state commissions’ conclusions that BellSouth’s practices enabled them to maintain their monopolies.

The state commissions clearly addressed quite different factual and legal issues. As the Commission has determined, the *sine qua non* of an unbundled subloop is that the CLEC gets access to, and must pay for, only that unbundled portion of the loop. *See* TRO ¶¶ 258, 260; *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 394 (“The dictionary definition of ‘unbundle[d]’ ... matches the FCC’s interpretation of the word: ‘to give separate prices for equipment and supporting services.’”). In no instance did a state commission require unbundling of, separate access to, or separate payment for an unbundled portion of a loop. *See* Comments of AT&T/CompTel at 21-23. Indeed, BellSouth’s principal grievance concerns services provided to CLEC UNE-P customers (as the heading of its petition confirms), where by definition the CLEC is paying for and has secured access to the *entire* loop. Instead, the state commissions addressed the lock-in effects created by BellSouth’s threats and practices of discontinuing DSL services if a customer were to switch to a competitor’s voice service.

¹ Paragraph 269 of the TRO supports no different conclusion. There, the Commission simply determined when *grandfathered* sub-loop unbundling would come to an end, and determined that no competitive harm would occur where the LEC provided neither broadband nor voice service to the customer. TRO ¶ 269. Once the LEC ceased providing voice service to the customer, it would have no ability to leverage the lack of access to DSL to retain the voice customer and there was thus no risk of monopoly maintenance or entry preclusion in any market. In contrast for BellSouth’s DSL practice here, it is the threat to discontinue (or actual discontinuance of service) based upon the customer’s choice of a competitive telephone service provider that *creates* the anticompetitive effect and entry barrier for the voice market. Unlike in the line sharing context, BellSouth is here using the switching and lock-in costs for one product (DSL) to ensure that its monopoly is maintained for the other (local voice service).

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What the state commissions have ordered also differs from sub-loop unbundling because the CLEC has the opportunity to displace the BellSouth DSL service with its own service much more directly under the arrangements required by the states. If only sub-loop unbundling were involved, the CLEC would have to convert the line to a full UNE loop, subject to whatever operational and ICA-imposed impediments that might involve, prior to being able to provide a competing DSL service to its voice customer. Under the state determinations, however, the CLEC has already secured the full loop (as a UNE-P customer) and would not need to surmount those additional barriers prior to providing a competing DSL service.

But even if BellSouth were correct that the Commission generally determined that nothing in the record before it required a finding that RBOCs must, under the federal Communications Act, continue to provide DSL service to CLECs' UNE customers, there would still be no support for BellSouth's conclusion that the state commission decisions are preempted because they "violate this Commission's rules and orders." Merely noting that state regulators applying state law have reached a different conclusion than federal regulators applying federal law *does not justify preemption*. As detailed below, it is well settled that a finding of preemption requires a conflict between state-imposed obligations or immunities and federal requirements that is so severe as to negate a federal policy. The Commission recognized this principle even where – unlike here – a state imposes unbundling obligations where the Commission had determined that no such unbundling obligations were appropriate. For challenges to "a particular unbundling requirement," the Commission therefore committed to examine *whether* a "conflict" with federal requirements (specifically, section 251(d)(3)) *in fact* existed. TRO ¶ 195. The Commission endorsed the judicial standard that, to justify preemption, state access requirements "must 'substantially prevent' the implementation of the federal regime to be precluded and that 'merely an inconsistency' between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3)." TRO ¶ 192 n.611 (internal citation omitted).

In this proceeding, BellSouth cannot identify *any* state commission unbundling determination. Nor can it identify *any* federal rule or requirement that is, in fact, "violated," by state commission determinations that BellSouth cannot punish customers who switch to a competing voice provider. BellSouth cannot even identify any "policy" of the Commission that creates any "inconsistency" with the state commission decisions (which the Commission's *Triennial Review Order* holding makes clear would still be insufficient to establish preemption). Nor could it: as AT&T has shown, and as the state commission decisions themselves establish, the state commissions carefully crafted requirements that directly address practices that harm competition in local telephone services – a result entirely consistent with federal policies. *See* Comments of AT&T/CompTel, at 5-13.

2. The State Decisions Enhance Incentives to Develop Broadband Services. BellSouth claims that the "uncertainty and inconsistency that arise from state regulation" makes the state

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decision “contrary to Congress’s policy of maintaining a ‘vibrant and competitive’ market for Internet services.” BellSouth Ex Parte 1, 3. BellSouth can point to nothing that supports this claim regarding its own service and facilities development, and it dramatically misstates the effect on competitive carriers’ development of broadband facilities and services. Such an amorphous “policy” consideration could not support preemption of state laws, and there is simply no record support for the investment effects that BellSouth claims.

Only in Reply Comments does BellSouth assert that the state decisions impede its “investment incentives,” but it fails to point to – much less demonstrate – any relevant effect on broadband service development. BellSouth cites only its need to secure an investment return on its *prior* DSL investment, when it argues that it “saw a business opportunity and capitalized on it by making wise, prudent capital investment to offer DSL service.” BellSouth Reply Comments, at 37. But refusing to sell DSL service to customers willing to pay *the full retail price* that BellSouth establishes for that service – and thereby allowing sunk DSL capabilities to lay fallow – can only *reduce* the return on BellSouth’s prior DSL investment. The state decisions continue to allow BellSouth to receive the full retail charge that BellSouth determines will generate an appropriate return. Indeed, the state decisions relieve BellSouth of the need to pay *anything* for use of the UNE facility (which BellSouth can presumably continue to depreciate). Of course, it is the increased returns on prior voice service investment facilitated by that anticompetitive practice that, in truth, motivate the practice – and validate the states’ judgments that the practice must be outlawed to promote local voice competition.

Moreover, BellSouth candidly acknowledges that it has completed rollout of DSL facilities where economically feasible, leaving only a small minority of households (in rural areas or with substandard loops) without service. *Id.* Nowhere does BellSouth suggest or show how any “inconsistency” created by state decisions prevents DSL rollout. BellSouth also vaguely refers to its need to invest in “next-generation FTTC/FTTP-type architectures.” The Commission has already responded to this interest by providing generous incentives through its TRO determinations, and BellSouth in any event leaves entirely unstated how the state *DSL* decisions, which do not even address future services that BellSouth might offer, have any bearing on its next generation investment. In short, the only “investment” effect at issue that the record supports is the benefit to BellSouth of maintaining its voice monopolies through its lock-in practices. Although it is obviously in BellSouth’s self-interest to pursue that goal, the Commission’s local competition policies (and the Act) clearly preclude *the Commission* from crediting or embracing any such rationale.

Nor is there any merit to claims that the state decisions impede BellSouth’s ability to compete with cable system operators. That claim is without record evidence support, and it suffers from four errors of logic. First, BellSouth *can* present cable customers with a full range of DSL and voice offerings, including bundled offers. What BellSouth cannot do, and what has nothing to do with the range of its offerings, is threaten to disconnect or refuse to provide service where a customer might elect to take BellSouth’s DSL service but not its voice service.

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Moreover, BellSouth has never explained why it would need to tie its voice and data services, refusing to sell the latter to any customers that do not buy the former, to be competitive with cable companies. Cable companies themselves do not require customers to subscribe to their core service in order to get cable modem service; rather, customers who are not cable subscribers are free to sign up for cable modem service. Second, competition with cable operators has nothing to do with BellSouth's claimed right to be able to *disconnect* service to customers that switch from BellSouth's voice service to a competing voice service. In these circumstances, BellSouth has already secured the DSL customer and prevailed over competing cable offerings. Third, BellSouth's continued success in securing DSL customers suggests that it has no structural disadvantage in competing with cable operators. Finally, if BellSouth were truly structuring its offerings to compete with cable operators (rather than impede local telephone service competition), a stand-alone DSL offering would provide it with significant advantages. Where a cable customer is provided with voice service by a carrier other than BellSouth, a stand-alone DSL offering would allow BellSouth to secure the customer to provide it with DSL service without also having to make the customer switch its voice service as well.

BellSouth's treatment of CLEC incentives to invest in broadband services and facilities is, if anything, even less candid and correct. BellSouth does not address the extensive CLEC arguments on this point, but instead asserts that "[n]o commenter could reasonably claim that, if these state decisions are not preempted, competitive carriers are *more likely* to invest in and offer their own competitive services." BellSouth Reply Comments, at 36. In fact, AT&T and others made precisely that claim at considerable length, *see, e.g.*, Reply Comments of AT&T/CompTel, at 8-10 (also citing Comments of Vonage Holding Corp.), and did so based on the *Commission's* own reasoning. In addressing line sharing, the Commission reasoned that the CLEC has much greater incentives to develop advanced services when it must secure and pay for the entire loop, rather than only a sub-loop. *See* TRO ¶¶ 258, 260. That reasoning applies directly here. The state commission orders apply to UNE-P customers, where the CLEC must pay for the entire loop. Those orders end an anticompetitive practice and thereby enable CLECs to compete for the voice service customer using UNE-P. In these circumstances (which would not arise if BellSouth could continue its lock-in practices), the CLEC has every incentive to ensure that it – rather than BellSouth – secures earnings from broadband services offered over the loop that the CLEC is already paying for in its entirety. The state commission decisions thus sharply increase the CLECs' incentives to develop and provide their own broadband offerings.

BellSouth attempts to skirt these realities by contending that it is a simple matter for voice CLECs to partner with Covad or other DLECs in line-splitting arrangements and that BellSouth's anticompetitive refusal to deal with customers encourages this type of CLEC/DLEC investment. That is fantasy. Covad serves fewer than *14 percent* of the central offices in BellSouth's nine state territory. And, partnering with a DLEC does nothing to eliminate the switching costs and lock-in effect created by the burdens BellSouth imposes when it requires a customer to find a new DSL service provider.

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BellSouth's treatment of CLEC investment is also flawed in its exclusive focus on facilities-based competition. *See* BellSouth Ex Parte at 3; BellSouth Reply Comments at 38-39. As the Commission has often recognized, and as the Act provides, consumers benefit from advanced services development that often arises from innovations at the network "edges" -- in software, customer premises equipment, and other equipment that facilitates new services and features but that requires access to broadband loop facilities. The incentives at issue apply with particular force to development of VoIP services. If the Commission were to preempt the state orders at issue here, nothing would prevent RBOCs from disconnecting DSL service when a customer discontinues its BellSouth voice service in favor of a VoIP offering *provided over that DSL line* (as noted above, BellSouth asserts a federally tariffed right to sell DSL service *only* to customers that purchase BellSouth voice service). Under the restrictions imposed by the state commissions, however, CLECs and others would be able to develop and offer new VoIP services. If not precluded from the market, they will develop software, support systems, applications and other advanced services that are of the utmost public importance even if they fail BellSouth's test of being facilities-based.

3. BellSouth's Assertions Regarding The Costs Imposed On It Are Absurd. BellSouth asserts that it "is incurring \$1500 in costs for every customer that has maintained their DSL service when converted to either UNE-P or UNE-L service with a CLEC" and "has incurred over \$1.5M in costs to comply with the LA, FL and KY DSL [orders]." BellSouth Ex Parte at 14. This evidence is not remotely credible and cannot form the basis for any defensible Commission determination.

BellSouth cannot seriously claim that it will incur \$1500 to continue to provide the very same DSL service over the very same facilities merely because a customer chooses to buy local voice service from another carrier. All that BellSouth has to do in that situation is obtain a credit card number from the customer to enable billing and then to continue to provide DSL service exactly as it did before -- as BellSouth willingly does for customers that purchase resale-based local service from another carrier. Rather, the costs that BellSouth complains about are costs of BellSouth's own anticompetitive decision to insist that if it must provide DSL service to customers that drop its voice service, it will do so only over a second line to the same premises. Having been told by the state commissions that it may not pursue its preferred anticompetitive strategy of discontinuing its DSL service altogether, BellSouth has opted for its next best anticompetitive strategy -- requiring that one of the customer's services be provided over a separate line, which creates a range of other anticompetitive effects. *See* Comments of AT&T/CompTel, Attachment A; Reply Comments of AT&T/CompTel, Attachment A. BellSouth has apparently determined that the costs of this new approach are outweighed by the anticompetitive benefits of inconveniencing customers that choose rivals' phone services; it can hardly use those costs as a defense of its preferred anticompetitive strategy.

BellSouth had ample opportunity to assert before state regulators that the restrictions at issue would be costly and impractical, but state regulators uniformly found those claims to be

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incredible (and irrelevant, in all events, in light of the magnitude of the anticompetitive harms caused by BellSouth's lock-in practices). The states reached those conclusions not based on *ex parte* slide presentations, but on trial-type hearings and depositions that destroyed the credibility and force of BellSouth's claims. *See, e.g.*, Florida PUC, Memorandum, Docket No. 020507-T, Complaint of Florida Competitive Carriers, at 58-61 (Nov. 20, 2003); Louisiana PSC, Order, Docket R-26173, at 13-14 (April 4, 2003). And nothing in Kentucky's or Louisiana's treatment of BellSouth's claims prompted BellSouth to challenge the states' determinations regarding costs and feasibility in the federal court appeals. *See* BellSouth Initial Brief on the Merits, *BellSouth Telecommunications, Inc. v. Louisiana PSC et al.*, 03CV372-D-M2 (D. M.D. La.) (filed Nov. 7, 2003); BellSouth's Initial Brief on the Merits, *BellSouth Telecommunications Inc. v. Cinergy Communications Co. et al.*, Civ. Action No. 03-23-JMH (filed June 23, 2003).

In fact, those state regulatory proceedings revealed important flaws in BellSouth's current claims regarding costs imposed by the state requirements. In Florida, hearings revealed that BellSouth's costs arise from its own anticompetitive actions: "As for the required system changes, BellSouth itself acknowledged that it was providing Fast Access service to customers served by CLECs using UNE-P, but that edits were later installed in its system to prevent that from happening." Florida PUC, Memorandum, Docket No. 020507-T, at 59-60. Understandably, the Florida commission disregarded BellSouth's cost claims based on these system changes, which BellSouth now revives before the Commission. BellSouth Ex Parte at 11. And in Louisiana, the PSC provided that it would adjust its order where BellSouth showed that the state's requirement was particularly onerous, and BellSouth did not do so. *See* Louisiana PSC, Order, Docket R-26173, at 13-14. Having failed to present credible evidence of excessively burdensome costs before the state commissions, having failed to challenge the state commissions' resolution of such claims in federal court, and having failed to present evidence in its Petition and Reply Comments, BellSouth should not now be permitted to reassert its failed claims in breezy *ex parte* submissions. The North Carolina commission has also recently called BellSouth's bluff and demanded that BellSouth support its bald assertions in this proceeding with cost study data. Incredibly, in its latest *ex parte* filing, BellSouth now claims that the Commission must act quickly before BellSouth is forced to admit in North Carolina that its cost claims have no basis.²

4. BellSouth's Tariff Does not Preempt The State Determinations. In addressing the effect of the wholesale DSL tariff, BellSouth in its Reply Comments again misstates the conditions that preempt state determinations or that permit the Commission to find the state decisions to be preempted. BellSouth particularly confuses when preemption might be required for the isolated state determinations regarding BellSouth's wholesale service as opposed to preemption in relation to the states' consistent focus on the anticompetitive effects of BellSouth's practices at the *retail* level.

² *See* Letter from L. Barbee Ponder IV, Senior Regulatory Counsel, BellSouth Corp., to Marlene Dortch, Secretary, FCC, WC Docket No. 03-251, at 2 (April 7, 2004).

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As to the state decisions addressing BellSouth's provision of wholesale DSL service and its tariff for that service, BellSouth dramatically overstates the preemptive scope of the tariff. *See* BellSouth Reply Comments at 25-30. Although the circuits diverge somewhat regarding the type of the conflict with a federal tariff that gives rise to a pre-emption claim, conflicting requirements is clearly the basis of any preemption. *See AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998).³

Here, BellSouth fails to identify and substantiate *any* conflict. Instead, to the extent the state commissions address wholesale obligations at all, they simply indicate that service cannot be denied to the wholesale customer merely because that customer eventually serves an end user who is a CLEC UNE-P voice customer. BellSouth's federal tariff is fully in accord, and establishes that the service is designed for DSL service providers "for provision of high speed data services to their customers" whenever the customer's premises is served by an "existing, in-service, Telephone company provided exchange line facility." BellSouth Tariff § 28.2.1(A) (see Attachment A). An "in-service exchange line facility" is defined as "the serving Central Office line equipment and all the plant facilities up to and including the Telephone Company-provided Network Interface Device (NID)." *Id.* That is, BellSouth does not have to provide service to premises where the line is out of service, no longer existing, or the line facility of another LEC. The state commission decisions do not require BellSouth to provide wholesale service in any of these excluded circumstances and did not suggest any conflict with a federal tariff requirement.

Instead, BellSouth now argues that a "conflict" exists because when a customer switches voice service from BellSouth to a CLEC, the "line facility" to its premises is suddenly no longer BellSouth-"provided." This is despite the fact that BellSouth continues to own, maintain, depreciate, repair and otherwise control the physical line facility, and UNE-P merely provides the CLEC with the right to employ the line's transmission capability. Indeed, in support of one of its petitions for forbearance, BellSouth has endorsed the claim that it is the "underlying facilities provider" for UNE-P lines. *See* Joint Petition of Qwest Corp., BellSouth Telecomms., Inc. and SBC Communications, Inc. for Expedited Forbearance, at 3 (filed July 31, 2003). Even if the tariff's terms were not perfectly clear and consistent with the state commission decisions,

³ The *GTE Tariff Order* is not to the contrary. There, the Commission carefully distinguished the inquiry of whether federal jurisdiction existed by virtue of "mixed use" (and thus federal tariffing was permitted) from the "inseparability doctrine" that may be invoked to justify preemption when there is an actual conflict between state and federal regulation that, absent preemption, would negate a federal policy. The Commission declined to consider the latter question once it resolved that tariffing was appropriate – not because the preemption analysis is somehow resolved by determining jurisdiction, as BellSouth would have it (Reply Comments at 26-27, 31), but because there was no claim that any state rate or other regulation conflicted with a provision of the federal tariff.

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any ambiguity in the tariff must be resolved against BellSouth. *See* Comments of AT&T/CompTel, at 35 (citing cases).

And a recent BellSouth revision to the tariff proves, beyond question, that the language BellSouth relies upon is, at a minimum, ambiguous, and, in fact, forecloses BellSouth's anticompetitive reading of BellSouth-"provided" in its prior tariff. On January 8, 2004 BellSouth revised its tariff to add a new, specialized "Session Based DSL Service." The new provisions relating to that service (Section 28.3.1 of BellSouth's FCC Tariff No.1, *see* Attachment A) contain both the original requirement that "[t]he designated end-user premises location must be served by an existing, in-service Telephone Company provided exchange line facility" *and* an additional requirement that the "in-service exchange line facility, as referred to in connection with BellSouth Session Based DSL service, *must be provided in connection with a BellSouth retail local exchange service.*" *Id.* The tariff provisions that relate to BellSouth's general DSL service clearly do *not* contain this express requirement that DSL service be provided in connection with BellSouth voice service, and thus cannot be read *unambiguously* to impose that same requirement.⁴

Contrary to BellSouth's suggestion, the relevant preemption considerations are very different for the retail services that were the focus of the state commission decisions. For these services, there is no federal tariff. Thus, no conflict can arise between any federal tariff and the state commission decisions regarding BellSouth's retail DSL practices. BellSouth attempts to avoid this obvious conclusion by conflating the effect of a federal tariff with the effect of federal jurisdiction. It reasons that "[i]f the tariffed DSL transmission service is interstate, as the Commission has said it is [in *GTE Tariff Order*], then the Internet service that that is based on that service must also be interstate and subject to the Commission's exclusive jurisdiction." BellSouth Reply Comments at 31.

BellSouth's reasoning is flawed in several respects. The *GTE Tariff Order* stated that the Commission "need not reach the question of whether the [preemption] inseverability doctrine applies" because it had just concluded that the service "is subject to federal jurisdiction under the Commission's mixed-facilities rule and properly tariffed as an interstate service." *GTE Tariff Order* at ¶ 28. That is, because a *tariff* precluded conflicting state regulations, there was no need to address the *separate* question raised by the inseverability doctrine – whether services are so

⁴ This new offering does not displace the more generally employed wholesale DSL offer in existence when the state commissions rendered their orders and which directly supports retail DSL service provision addressed by those commissions. *See* BellSouth Tariff FCC No. 1, § 28.2. And the appropriate reaction to the new tariff provision that purports to authorize BellSouth to lock in voice customers who also purchase sessions-based DSL service through the threat of disconnection (if the customer switches voice service providers) is for the Commission to find the provision unlawful under Section 201(b) for the same reasons that the state commissions found BellSouth's practices to be unlawful.

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intertwined (and state policies negate a federal one) such that federal jurisdiction is exclusive rather than, as in the usual case, jointly exercised with the states. *See Louisiana PSC v. FCC*, 476 U.S. at 355. For the retail services at issue in this case, there is no federal tariff, which renders the *GTE Tariff Order* irrelevant. BellSouth instead attempts to use the *GTE Tariff Order* to establish the *exclusivity* of federal jurisdiction over mixed jurisdiction services, which is precluded under *Louisiana PSC*, *California I*, *NARUC*, and related cases unless (i) the services are inseverable and (ii) state regulation conflicts with federal requirements so much that it “negates” a federal policy.⁵ The *GTE Tariff Order* is no support for the first proposition, because it expressly *declined* to address the inseverability doctrine (even in relation to wholesale services). And BellSouth simply fails to show how the state decisions relating to retail DSL provision in any manner “negate” a federal policy.

For the foregoing reasons and those set forth in AT&T’s Comments and Reply Comments, BellSouth’s Petition should be denied.

Sincerely,

David L. Lawson

Counsel for AT&T Corp.

⁵ *See, e.g., Louisiana PSC v. FCC*, 476 U.S. at 360; *NARUC v. FCC*, 880 F.2d at 428-29; *California v. FCC*, 905 F.2d at 1241-43; *see also Southwestern Bell Tel. Co. v. PUC of Texas*, 208 F.3d 475, 480 (5th Cir. 2000) (upholding state commission authority over mixed interstate and intrastate Internet traffic, and rejecting argument that state determination is barred due to effect on interstate traffic); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (noting FCC acknowledgement that ISP services are jurisdictionally mixed, subject to some state-determined regulation); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 114-15 (D.C. Cir. 1989).

EXHIBIT A

BELLSOUTH TELECOMMUNICATIONS, INC.
BY: Operations Manager - Pricing
29657, 675 W. Peachtree St., N.E.
Atlanta, Georgia 30375
ISSUED: JANUARY 8, 2004

TARIFF F.C.C. NO. 1
2ND REVISED PAGE 28-18
CANCELS 1ST REVISED PAGE 28-18

EFFECTIVE: JANUARY 9, 2004

ACCESS SERVICE

28 - Digital Subscriber Line Service (Cont'd)

28.2 BellSouth ADSL Service

28.2.1 General

- (A) BellSouth ADSL service is intended as an industrial offering that is made available to Network Service Providers for provision of high speed data service to their customers, and provides subject to the terms and conditions set forth herein, for the establishment of a point-to-point Connection and Virtual Circuit (VC) between two customer designated locations. BellSouth ADSL service is primarily intended to provide a Connection and VC between an end-user premises location designated by Network Service Providers (NSP), including Internet/Intranet Service providers (ISP), Competitive Local Exchange Companies (CLEC), etc., hereinafter referred to as customer, and the customer's location. The design, maintenance, and operation of BellSouth ADSL service contemplates end-to-end communication consisting of combinations of overlay services such as in-service, Telephone Company-provided, compatible end-user premises exchange line facility, BellSouth Exchange Access Asynchronous Transfer Mode Service (XAATMS) or Managed Shared Asynchronous Transfer Mode Service (MSATMS) and other appropriate transport facilities. BellSouth ADSL service may also be configured as BellSouth ADSL service, End-User Aggregation. (C) (C)

The designated end-user premises location must be served by an existing, in-service, Telephone Company provided exchange line facility and, with the exception of BellSouth ADSL service, End-User Aggregation (EUA), the designated customer location must be connected to BellSouth XAATMS or MSATMS, with the BellSouth XAATMS or MSATMS port enabled for Unspecified Bit Rate (UBR) transmission. Both the end-user and the customer-designated premises must be in the same Local Access and Transport Area (LATA). BellSouth ADSL service utilizes the facilities used by these services in order to establish a VC between the customer-designated location and the customer-specified end-user premises location. BellSouth ADSL service, End-User Aggregation, does not overlay BellSouth XAATMS or MSATMS.

Multiple VCs (simultaneous connections to the same and/or other customer-designated premises) are available as overlays of a single exchange line facility when provisioned using BellSouth XAATMS or MSATMS provisioning methods. Multiple VCs are not available with EUA. When associated with BellSouth ADSL service, MVC, VCs specified in 28.2.1(C)(6)(a) are available only as UBR QoS. BellSouth ADSL service VCs specified in 28.2.1(C)(6)(b) are provided with a CBR QoS. A QoS designation is a parameter that defines the transfer characteristics of a customer's VC data-traffic as it is transported through the Telephone's Company's network. (N) (N) (N) (N) (N) (N)

An in-service exchange line facility, as referred to in association with BellSouth ADSL service, is the serving Central Office line equipment and all the plant facilities up to and including the Telephone Company-provided Network Interface Device (NID).

- (B) BellSouth ADSL service is furnished where suitable facilities are available as determined by the Telephone Company. BellSouth ADSL service Central Office availability will be as listed in the National Exchange Carriers Association (N.E.C.A.) F.C.C. Tariff No. 4.

All BellSouth marks contained herein and as set forth in the trademarks and servicemarks section of this Tariff are owned by BellSouth Intellectual Property Corporation.

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ISSUED: JANUARY 8, 2004

TARIFF F.C.C. NO. 1
ORIGINAL PAGE 28-44

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ACCESS SERVICE

28 - Digital Subscriber Line Access Services

28.3 BellSouth Session Based DSL Service

28.3.1 General

- (A) BellSouth Session Based DSL service is made available to Network Service Providers for provision of high speed data service to their customers, and provides subject to the terms and conditions set forth herein, for the establishment of a point-to-point Connection and Virtual Circuit (VC) between two customer designated locations. BellSouth Session Based DSL service is primarily intended to provide a Connection and VC between an end-user premises location designated by Network Service Providers (NSP), including Internet/Intranet Service providers (ISP), Competitive Local Exchange Companies (CLEC), etc., hereinafter referred to as customer, and the customer's location. The design, maintenance, and operation of BellSouth Session Based DSL service contemplates end-to end communication consisting of combinations of overlay services such as in-service, Telephone Company-provided, compatible end-user premises exchange line facility and other appropriate transport facilities. BellSouth Session Based DSL service allows the Network Service Provider to purchase individual sessions. BellSouth Session Based DSL service can only be configured as End-User Aggregation.

BellSouth reserves the right to measure, monitor and limit usage of these services to ensure a quality service and identify and restrict excessive use.

The designated end-user premises location must be served by an existing, in service, Telephone Company provided exchange line facility. An in-service exchange line facility, as referred to in association with BellSouth Session Based DSL service, must be provided in connection with a BellSouth retail local exchange service and is the serving Central Office line equipment and all the plant facilities up to and including the Telephone Company-provided Network Interface Device (NID).

The regulations, rates and charges specified in this tariff for BellSouth Session Based DSL service are in addition to applicable regulations, rates and charges specified in this and/or other Tariffs of the Telephone Company, but do not include any regulations, rates or charges which may be applied or charged to the end-user by the customer.

- (B) Both the end-user and the customer-designated premises must be in the same Local Access and Transport Area (LATA). BellSouth Session Based DSL service utilizes the facilities used by these services in order to establish a VC between the customer-designated location and the customer-specified end-user premises location. BellSouth Session Based DSL service, End-User Aggregation, does not overlay BellSouth XAATMS or MSATMS.
- (C) BellSouth Session Based DSL service is furnished where suitable facilities are available as determined by the Telephone Company. BellSouth Session Based DSL service Central Office availability will be as listed in the National Exchange Carriers Association (N.E.C.A.) F.C.C. Tariff No. 4.

All BellSouth marks contained herein and as set forth in the trademarks and servicemarks section of this Tariff are owned by BellSouth Intellectual Property Corporation.
